CV-00-5386 (SLT)(MDG)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ROBERT RICCOBONO,

Plaintiff,

-against-

RUDOLPH W. CREW, individually and as CHANCELLOR of the New York City School District (the "Chancellor"), BOARD OF EDUCATION OF THE CITY OF NEW YORK (the "City Board"),

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO QUASH PLAINTIFF'S TRIAL SUBPOENAS

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DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO QUASH PLAINTIFF'S TRIAL SUBPOENAS

PRELIMINARY STATEMENT

On January 25, 2011, six days before the January 31, 2011 trial date plaintiff served two trial subpoenas, one on defendants Crew and the other on defendant New York City Department of Education ("Department of Education").[1] These subpoenas seek: (1) financial records of defendant Crew; and (2) payroll and personnel records of the Department of Education, primarily showing concerning salary history of former Department of Education employees.

As set forth below, these subpoenas should be quashed because: (1) they seek materials that plaintiff could have sought during the extensive discovery period in this case, but failed to do so; and (2) were served less than a week before trial, although the trial date was scheduled three months ago, on October 21, 2010. The service of these subpoenas is a flagrant disregard of the discovery deadlines established by the Court in this case and the Court should quash both of them.

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[1] Plaintiff provided defendants with electronic copies of the subpoenas on Monday, January 25, 2011.

ARGUMENT

PLAINTIFF MAY NOT USE TRIAL SUBPOENAS TO ENGAGE IN DISCOVERY AFTER THE DISCOVERY DEADLINE HAS PASSED. BECAUSE THE MATERIALS PLAINTIFF NOW SUBPOENAS COULD HAVE BEEN REQUESTED IN DISCOVERY, THEY ARE IMPROPER AND SHOULD BE QUASHED.

As an initial matter, plaintiff's decision to wait to serve trial subpoenas on defendants until six days before trial, when the trial date was set on October 21, 2010, is both unexplained and unexplainable. Even if the subpoenas had been served in a timely fashion, they should be quashed because they unquestionably seek materials that plaintiff could have requested during discovery in this case. In fact, with respect to the financial records of defendant Crew, plaintiff has admitted as much in the Joint Pretrial Order.

Litigants may not used Rule 45 trial subpoenas to circumvent expired discovery deadlines. See Aristocrat Leisure Limited v. Deutsche Bank Trust Company, 262 F.R.D. 293, 296, n. 2 (S.D.N.Y. 2009); McKay v. Triborough Bridge and Tunnel Authority, 2007 U.S. Dist. LEXIS 81722 *5-*7 (S.D.N.Y. November 5, 2007) (holding that a Rule 45 trial subpoena served after the close of discovery was improper); Dodson v. CBS Broadcasting, Inc., 2005 U.S. Dist. LEXIS 29703 (November 29, 2005) ("Rule 45 trial subpoenas [duces tecum] may not be used, however, as means to engage in discovery after the discovery deadline has passed")(citation and internal quotation marks omitted); Revander v. Denman, 2004 U.S. Dist. LEXIS 628 *3 (S.D.N.Y. January 21, 2004) ("[w]hen a [party] is aware of the existence of documents before the discovery cutoff date and issues discovery requests including subpoenas after the discovery deadline has passed, then the subpoenas and discovery requests should be denied.") (citation omitted).

This action was commenced on September 8, 2000, and in the ensuing decade, there was ample opportunity for plaintiff to seek discovery, including the documents that are the subject of the subpoenas. Discovery in this case was conducted in two phases. The first occurred between November 14, 2000 May 15, 2001 (plaintiff also supplemented his discovery responses in 2005). Plaintiff was represented by David Dretzin from the commencement of the action until Mr. Dretzin's death in June 2006.

The case was administratively closed on September 21, 2005. On June 6, 2007, plaintiff's current counsel, Elissa Hutner, filed a notice of appearance. The action was reopened several days later, on June 11, 2007. After the action was reopened, plaintiff moved to amend the complaint, and after motion practice, plaintiff filed an Amended Complaint on May 12, 2009. On September 4, 2009, discovery resumed, with a final deadline of February 12, 2010. Thereafter, defendants moved for summary judgment, which was granted in part and denied in part by this Court's September 3, 2010 Memorandum and Order.

As discussed below all of the materials that plaintiff has subpoenaed for trial could have been requested by him during the two discovery periods in this case. During this action, plaintiff served two document requests pursuant to Rule 34 of the Federal Rules of Civil Procedure. The first request was served on November 13, 2000. The second request was served approximately nine years later, on August 3, 2009. In neither of these document requests did plaintiff seek the materials that he now attempts to obtain via trial subpoena. Nor did plaintiff make any additional document request during the September 2009 to February 2010 discovery period to request these documents, which were clearly available at that time (of course, defendants would have objected to producing these materials, and then the matter could have been properly addressed within the discovery period). Plaintiff's failure to request the documents at issue during the discovery period does not entitle him to attempt to remedy his mistakes by now seeking them by means of a trial subpoena.

The Subpoena for Defendant Crew's Financial Records

The trial subpoena for defendant Crew's financial records seeks documents that plaintiff apparently wishes to use in connection with his request for punitive damages against defendant Crew: (1) defendant Crew's federal, state and local income tax returns for the years 2007, 2008 and 2009; (2) the last 12 months of brokerage statement[s] for all stock/bond accounts held in the name of Rudolph Crew, jointly or individually; and (3) copies of all property tax bills paid in the last 12 months by Rudolph Crew. See Exhibit "A" annexed to the January 25, 2011 Declaration of Paul Marks.

As an initial matter, defendants have sought *in limine* to preclude all such evidence and have requested that the Court not instruct the jury on punitive damages, as there is no basis for an award of such damages in this case. In any event, plaintiff's trial subpoena for these materials should be quashed because he clearly could have sought these documents in either phase of the discovery held in this case, but did not do so. Oddly, in the Pretrial Order, plaintiff places responsibility for his not having these records on his prior counsel, the deceased Mr. Dretzin. On page 5 of the pretrial order, plaintiff states: "Plaintiff will not have documentation on Rudolph Crew's financial situation until trial as these documents have to be been subpoenaed for trial. Plaintiff's former counsel was not successful in obtaining these documents."

It is both troubling and mystifying that plaintiff attributes the failure to obtain defendant Crew's financial records to his prior counsel. As noted above, Mr. Dretzin did not request these records in the only document request that he served. Moreover, if he made informal requests for these materials, and if those requests were met with objections, he certainly never made a motion to compel. The second document request, served by plaintiff's current counsel in August 2009, also could have sought defendant Crew's financial records, yet no such request was made. Moreover, plaintiff's current counsel made no request for these records in the five-month discovery period between September 4, 2009 and February 12, 2010. Instead, eleven months after the close of discovery, and six days before trial, plaintiff serves a trial subpoena for defendant Crew's financial records. The Court should not countenance plaintiff's patently improper attempt to evade the discovery deadline in this and obtain by trial subpoena what he failed to request during the more than ten years since this action was commenced. Accordingly, the Court should quash the trial subpoena for defendant Crew's financial records.

The Subpoena for Department of Education Payroll and Personnel Records

The trial subpoena directed to the Department of Education seeks the following documents: (1) any document reflecting the percentage of salary increments, and the effective date of these increases, paid to DOE employees in the Title of Community Superintendent for the years 2000 through 2009; (2) DOE Payroll "Screen shots" or other records indicating the salary as of June 30, 2003 of the following present or former employees of the Department of Education of the City of New York: Patricia Romandetto, Betty Rosa, Irma Zardoya, Joseph Kovaly, Carmen Farina, Vincent Grippo, Kathleen Cashin, Joseph Quinn, Michelle Fratti, Marlene Siegel, Vincent Clark, Lila Edelkind; (3) DOE payroll administration records or screen shots, showing the salary as of April 5, 2006 of the following former DOE employees: Marlene

Siegel, Vincent Clark, Lila Edelkind; (4) DOE personnel and or payroll records or documents providing the salary and salary increments for Community Superintendents from 2009 through the present; and (5) List of Community Superintendent Positions or "lines" including vacancies existing in the Department of Education as of April 1, 2006. See Exhibit "B" annexed to the January 25, 2011 Declaration of Paul Marks.

Defendants have also moved *in limine* to exclude these records and the testimony of former Department of Education employees, as they are irrelevant to plaintiff's due process claim and plaintiff is barred from relitigating the reasons for his removal by Chancellor Crew. As with defendant Crew's financial records, neither plaintiff's former counsel nor his current counsel ever requested the documents sought in this trial subpoena during discovery, despite the fact that they had plenty of opportunities to do so. It bears noting that as plaintiff seeks documents dating from 2006 through 2009, there is no question that he could have sought them during either discovery period in this case. It is simply inexcusable for plaintiff to seek documents dating back to 2000 by serving an extensive trial subpoena on defendants less than a week before trial. Accordingly, because the trial subpoena directed to the Department of Education plainly seeks discovery that failed to timely request, it should be quashed.

CONCLUSION

For the foregoing reasons, the Court should quash both of plaintiff's trial subpoenas, together with such other and further relief as the Court deems just and proper.

Dated: New York, New York
January 25, 2011

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